STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

J & J CONSTRUCTION CO.,

Plaintiff-Appellant,

Docket No. 119357

-vs-

BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 1 and MARK KING, jointly and severally,

Defendants-Appellees.

REPLY BRIEF -- APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

The unchallenged findings of the trial court in this action establish: 1) that Defendant/Appellee, Mark King ("King"), in his capacity as an agent of Defendant/Appellee, Brick Layers and Allied Craftsmen, Local 1 ("the Union") (collectively "Defendants"), made *false and defamatory statements* about the quality of work performed by Plaintiff/Appellant, J & J Construction Co. ("J & J Construction" or "J & J"), a purely private figure; 2) King's false and defamatory statements *were the direct cause* of J &J Construction's loss of a contract with the City of Wayne for which it was the lowest responsible bidder; and 3) Defendants *intended* that the false and defamatory statements would deprive J & J of its contract with the City of Wayne.

Defendants do not dispute that the trial court's findings establish J & J Construction's causes of action for defamation and intentional interference with business expectancy. Their appeal from the trial judgment is based solely on the claim that they enjoy a qualified privilege from defamation liability, and an absolute privilege from intentional interference liability, because King's defamatory statements were made to the Wayne City Council.

Contrary to the assertion in Defendants' brief and the *amicus curiae* brief submitted by The American Civil Liberties Union Fund of Michigan ("the ACLU"), neither the United States Supreme Court nor any other federal or Michigan court has *held* that the ***New York Times v Sullivan***[1] "actual malice" standard is applicable to an action for defamation of a private figure committed in the course of petitioning to a governmental entity. In each of the cases on which Defendants rely either the plaintiff was a public official or public figure, or there was no defamation claim at issue. Language in those cases regarding defamation of a private figure, therefore, is mere *dicta*.

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[1] 376 US 254; 84 S Ct 710; 11 LEd2d 686 (1964).

Those Michigan and federal appellate cases in which defamation of a private figure *was* at issue, however, have uniformly held that the Petition Clause requires only that a private figure defamation plaintiff prove that the defendant's false and defamatory statements were made negligently. These holdings are consistent with, indeed required by, the United States Supreme Court's conclusions in ***Gertz v Welch***[2] that the First Amendment guarantees of freedom of speech and freedom of the press do not provide a privilege for negligent defamation of private figures, and in ***McDonald***[3] that the Petition Clause provides no greater protection than other First Amendment freedoms.

Since negligently made false and defamatory statements regarding private figures do not enjoy protection under the First Amendment, the constitutional underpinnings of the ***Noerr-Pennington*** doctrine are not implicated here, and the trial court correctly held that Defendants enjoyed no Petition Clause privilege against liability for interference with J & J Construction's business expectancy. Defendants and the ACLU ignore the significance of this exclusion of defamation from the protection of the Petition Clause in arguing that *all* attempts to influence government action, regardless of the means employed, enjoy immunity from *all* causes of action. Simply put, a state common law tort action based on defamatory statements cannot chill or abridge any constitutional right if there *is no constitutional right* to defamation.

Defendants' argument against a generalized "commercial" exception to ***Noerr-Pennington*** miscomprehends the basis for and thrust of J & J Construction's position. The Petition Clause is intended to protect the right of citizens to make their views known to government in order

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[2] ***Gertz v Robert Welch, Inc***, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

[3] ***McDonald v Smith***, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384 (1985).

to influence decisions regarding public policy, such as the passage and enforcement of laws and regulations. Where a governmental agency is acting purely as another consumer in the marketplace, choosing between competing products on purely economic grounds, attempts to influence its decision are unrelated to the democratic principles embodied in the Petition Clause.

Noerr-Pennington has been applied to actions outside the realm of antitrust on the basis of its First Amendment underpinnings. Where the First Amendment right to petition is not implicated, ***Noerr-Pennington*** is inapplicable, and no "exception" to the doctrine need be established. Neither ***Noerr-Pennington*** nor the First Amendment provides Defendants immunity from J & J Construction's claim for intentional interference with its business expectancy in a masonry contract with the City of Wayne.

Finally, Defendants' claim that J & J's cause of action for intentional interference is preempted by federal labor law is not before this Court. The Court of Appeals panel below affirmed the trial court's ruling on this issue, and Defendants have neither sought leave for a cross-appeal nor moved for leave to add additional issues.

II. ARGUMENT

A. THE PETITION CLAUSE DOES NOT REQUIRE OR PERMIT A QUALIFIED PRIVILEGE FOR DEFAMATION OF A PRIVATE FIGURE.

Defendants argue that "the United States Supreme Court, the Sixth Circuit Court of Appeals, the Michigan courts, and the majority of other jurisdictions have *held* that the Petition Clause provides a qualified privilege against defamation claims regardless of the *person* or matter under discussion." [***Brief on Appeal - Appellees***, at 38 (emph. added)]. This argument relies on a patent misreading of the United States Supreme Court opinions in ***McDonald v Smith, supra***, and ***Gertz v Welch, supra***, and a misunderstanding of the *holdings* of the other cases on which they rely.

1. McDonald Does Not Extend a Qualified Privilege To Defamation In The Course Of Petitioning.

In ***McDonald v Smith, supra***, the United States Supreme Court clearly stated that the Petition Clause provides no greater protection than the First Amendment grants to freedom of speech or freedom of the press. The defendant had argued that his defamation of a candidate for a United States Attorney position in a letter to the President was absolutely privileged from liability under a state common law defamation action because it constituted a petition to government. Rejecting this contention, the Court stated:

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. [Citation omitted.] These First Amendment rights are inseparable, [citation], *and there is no sound basis for granting greater constitutional protection to statements made in a petition* to the President *than other First Amendment expressions.*

McDonald, 472 US at 485 (emph. added).

In its earlier decision in ***Gertz v Welch, supra***, the Court had delineated the protection that the First Amendment provides against defamation claims brought by purely private figures. The Court explicitly rejected imposition of the "actual malice" standard which it had applied to defamation actions against public officials and public figures in ***New York Times v Sullivan, supra***, on the ground that extension of this standard to private figures would abridge the States' legitimate interest in enforcing a legal remedy for defamation.

The ***Gertz*** court held that, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of

defamatory falsehood injurious to a private individual." 418 US at 347.[4]

In ***McDonald***, the issue was whether North Carolina defamation law which, as does Michigan law, required a public officer or public figure plaintiff to establish "actual malice," *i.e.*, that the defendant knew that his defamatory statement was false or was reckless regarding its truth or falsity, was consistent with the protection provided by the Petition Clause. Accordingly, the Court addressed only the issue of qualified immunity under ***New York Times***, and its holding is expressed in terms of the actual malice standard.[5]

To read into ***McDonald*** an actual malice requirement for defamation of a *private figure* in the course of petitioning, however, is to ignore the Court's explicit language and to impute to it an ignorance of its prior decision in ***Gertz***. ***McDonald*** expressly stated that the Petition Clause offers no greater immunity than is provided to freedom of speech or the press. ***Gertz*** held that freedom of speech and the press under the First Amendment does not require imposition of the ***New York Times*** actual malice standard for defamation actions by public figures, but permits the States to provide a remedy for defamation of a private figure as long as they do not provide for liability without fault.

The Michigan Legislature has addressed the requirement of a showing of fault set forth by

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[4] J & J Construction has never contended that false statements enjoy *no* protection under the Petition Clause, as Defendants mischaracterize its position. While false statements have been recognized as having no constitutional value, J & J does not dispute that the First Amendment requires that citizens be granted some leeway in order that legitimate speech and petitions not be chilled. As ***Gertz*** clearly requires, and ***MCL 600.2911*** provides, defamation liability may not be imposed on a showing of falsity alone – a plaintiff must establish at least negligence on the part of the defendant to prevail in a defamation claim. This requirement, however, is the extent of the constitutional protection which is granted to false and defamatory statements by the First Amendment.

[5] The Court's opinion was in keeping with the mandate that an appellate court's ruling should be limited to the issues actually presented, and the resolution of which are necessary to determination of the case. This is a rule which, unfortunately, has been honored principally in its breach by too many courts, including the panel below.

Gertz. The defamation statute which it enacted prohibits an action by a private figure "unless the defamatory falsehood concerns the private individual *and was published negligently*." ***MCL 600.2911(7)*** (emph. added).[6] This negligence requirement provides the protection of the First Amendment right to freedom of speech and freedom of the press mandated by ***Gertz***. Under ***McDonald***, that negligence requirement provides equally sufficient protection of the freedom to petition.

The Court of Appeals panel in this case has grafted additional requirements on this statute, not required or even suggested by ***Gertz*** or ***McDonald***. In effectively amending Michigan's defamation legislation, the panel erred.

Finally, it must be noted that the ACLU's reliance on and analysis of ***White v Nichols***, 44 US (3 How) 266; 11 LEd 591 (1845), is erroneous. The ACLU argues that, since the ***New York Times*** "actual malice" standard had not yet been announced, the status of the plaintiff as a public official in ***White*** could not have been relevant, and its requirement of proof of "express malice" was based solely on the fact that the statements at issue constituted petitioning activity. The argument is faulty in at least two respects.

First, the Court in ***White*** did not base its decision on constitutional principles, but on the basis of common law privilege. It found that, although "malice" was generally inferred if alleged, the plaintiff was obligated to establish "malice" if the statement at issue was subject to *any* privilege. The Court examined several recognized privilege exceptions: "common interest"; statements to a master regarding his servant, statements in legal and court proceedings; and "publications duly made

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[6] There is no dispute that J & J Construction established that Defendants' defamation was *at least* negligent. The trial court's findings regarding King's experience as a bricklayer and the deceptiveness of the photographs on which he based his defamatory statements, moreover, would be sufficient to support a finding of knowing or reckless falsehood.

in the ordinary mode of parliamentary proceedings." 44 US at 286, 287. The Court also considered the common law privilege to make statements regarding "a candidate for public office" or "public officers." ***Id***, at 290.

The Court in ***White*** did not, however, determine which common law privilege might be applicable, or even if *any* privilege applied in the case. The Court merely stated that: *"if the publication declared upon was to be regarded as an instance of privileged publications*, malice was an indispensable characteristic which the plaintiff would have been bound to establish in relation to it." 44 US at 292. The Court did not address, much less apply, a constitutional privilege.

Second, the showing of "express malice" required in ***White*** cannot be equated with the ***New York Times*** "actual malice" standard. Under the law obtaining when ***White*** was decided, "falsehood and the absence of probable cause will amount to proof of malice." 44 US at 291. Under the modern ***New York Times*** standard, "actual malice" means knowledge of falsity or reckless disregard of the truth or falsity of a statement. ***McDonald's*** reference to ***White*** cannot be read as "endorse[ment of] the actual-malice standard to *all* petitioning activity," as asserted by the ACLU.

McDonald does not provide a qualified privilege, beyond the requirement of proof of negligence, for defamation of a private figure in the course of petitioning activity.

2. None of the Cases Cited by Defendants Have Held That a Qualified Privilege Applies to Defamation of Private Figures.

Defendants cite a number of cases which purportedly support their argument for a qualified privilege against liability for defamation of a public figure. Examination of the *facts* and *holdings* of these cases demonstrates the poverty of Defendants' argument.

The sole Michigan case on which Defendants rely is ***Azzar v Primebank FSB***, 198 Mich App 512; 488 NW2d 793 (1993). *There was no defamation claim* in ***Azzar***. The plaintiffs were

shareholders in the defendant bank who sought to obtain additional shares. Under federal regulations, they were required to obtain approval from the Federal Home Loan Bank Board, which required a showing that the proposed acquisition would not give the plaintiffs control over the bank. The plaintiffs filed a "rebuttal of control" document with the FHLBB, and the defendant bank opposed the application by, in part, informing the FHLBB that the plaintiffs had provided incomplete information. The FHLBB in fact found that the plaintiffs' filing was "materially insufficient," and required them to provide additional information. Their application to purchase the additional stock was denied.

The plaintiffs' suit claimed, *inter alia*, that the defendant breached a fiduciary duty to them by opposing their application and misrepresenting facts to the FHLBB. They argued that the defendants' conduct fell within the "sham" exception to the ***Noerr-Pennington*** doctrine because the information provided to the FHLBB was false. There was no allegation, however, that the defendant had made *defamatory* statements about the plaintiffs.[7] In fact, the Court of Appeals expressly distinguished the claim in ***Azzar*** from one for defamation, stating: "Because the present case is not a defamation case, we find the defamation exception to the protection afforded by the First Amendment right to petition is inapplicable." 198 Mich App at 518.

The ***Azzar*** opinion's statement that "knowing falsehoods are generally protected under the First Amendment right to petition," 198 Mich App at 518-519, must be read in light of its focus on the sham exception to ***Noerr-Pennington***. The plaintiffs in ***Azzar*** were arguing that the defendant's petitioning was a sham *because* defendant employed false information, *i.e.*, it was not seeking a

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[7] The opinion does not make clear what false information the defendant was alleged to have provided to the FHLBB, or even whether the defendant's "false information" was anything other than the statement that the plaintiffs' filing was "materially insufficient." The opinion does not, however, set forth any allegation of statements regarding the plaintiffs' good name or reputation.

genuine, proper decision from the FHLBB. The panel properly rejected this claim, based on the decision in ***City of Columbia v Omni Outdoor Advertising Inc***, 499 US 365; 111 S Ct 1344; 113 LEd2d 382 (1991), which had recently been announced.

Because ***Azzar*** did not involve a defamation claim, any statement in the opinion regarding the scope of ***McDonald*** is pure *dictum*. More importantly, the decision in ***Azzar*** did not require or entail balancing of the Petition Clause against "the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation," a balancing which was central to ***Gertz***. 418 US at 347. As the ***Azzar*** panel itself recognized, "defamation actions are unique because they involve an individual's right to the protection of a good name." 198 Mich App at 518.

This Court, in ***Rouch v Enquirer and News of Battle Creek***, 427 Mich 157, 200; 398 NW2d 245 (1986), found that "reputational interests are as important today, if not more so, as when the common law first recognized defamation as a tort." In light of the fundamental state interest in protecting private figures against defamation, the late Justice Brickley employed a searching analysis of the balance to be struck between that interest and the First Amendment rights to freedom of speech and of the press. That analysis led to the conclusion that, notwithstanding the importance of the First Amendment free press protections at issue, a private figure was not required to prove malice in a defamation action against a newspaper.

There is no basis either in constitutional jurisprudence or in simple reason for an argument that the freedom to petition government is more important or more deserving of protection than the right to freedom of the press. ***Rouch*** teaches, therefore, that a private figure's protection against false and defamatory statements should not be diminished, merely because the defamatory statements are made to a governmental agency, without a similarly exhaustive and scholarly analysis. The broad *dicta* in ***Azzar*** provides no substitute for such an analysis. It was clear error for the panel below to

base its sweeping ruling on ***Azzar***, and it is facile for Defendants to rely on the case here.

As with ***Azzar***, none of the federal cases on which Defendants rely involved a defamation claim against a private figure. None weighed the interests of a defamed private figure against the risk of abridging Petition Clause protection *because the issue was not presented.* None of the cases, therefore, provides persuasive authority to support Defendants' argument.

In ***Stachura v Truszkowski***, 763 F2d 211 (CA 6, 1985),[8] the plaintiff brought an action under 42 USC 1983, claiming that the defendants engaged in a conspiracy to deprive him of free speech and property rights, resulting in his dismissal from a public school teaching position. The trial court, *inter alia*, granted a JNOV motion by a non-governmental defendant, Truszkowski, on the basis that the claim against her arose from her complaints to the school board regarding the plaintiff's teaching methods, which were protected petitioning of government. With virtually no discussion, the Sixth Circuit adopted the District Court's opinion, and affirmed. There was, however, *no defamation claim* raised in the case.

Defendants also cite ***Eaton v Newport Board of Education***, 975 F2d 292 (CA 6, 1992), which bears no resemblance to this case. The plaintiff, a school principal, was both a public official and a public figure. The claims against the teacher's union and its representative were for advocating the plaintiff's removal from his job because of his reference to a teacher as a "nigger," and were brought under Section 1983. There was no issue whether the plaintiff had made the statement, and *there was no claim for defamation.*

Similarly, ***Gable v Lewis***, 201 F3d 769 (CA 6, 2000), involved a complaint for violation of Section 1983, with *no claim of defamation.* The plaintiff claimed that the defendants had violated

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[8] Rev'd in part on other grounds, *sub nom* ***Memphis Community School Dist v Stachura***, 477 US 299; 106 S Ct 2537; 91 LEd2d 249 (1986).

her Petition Clause rights by removing her company from a towing referral list after she filed a discrimination complaint. The issue presented was whether the Petition Clause protects the right to petition government regarding the plaintiff's personal business and commercial interests, or only regarding matters of public concern. Neither the analysis nor the holding in ***Gable*** is apposite here. The case did not address (nor could it, under the facts presented) the scope of immunity for defamation committed in the course of petitioning activity.

In ***Stern v United States Gypsum Inc***, 547 F2d 1329 (CA 7, 1977), the plaintiff was an IRS agent who was removed from his assignment to audit the defendant company, and alleged damage to his career, because of complaints to his supervisors made by the company and three of its executives. He sued under ***42 USC 1985***, claiming a conspiracy to prevent him from discharging his official duties, and raised state law claims for defamation and interference with contract rights. The sole issue presented was whether the plaintiff's complaint stated an actionable claim under Section 1985, upon which the federal court's jurisdiction was based.

The Seventh Circuit panel found that the presentation of complaints regarding a public employee's professional conduct to his supervisors "is a classic example of the right to petition," and that the prospect of a federal lawsuit "*could* chill the exercise of the right to petition." 547 F3d at 1343 (emph. added). Contrary to Defendants' assertion, however, ***Stern*** did not rule that the Petition Clause conferred immunity, absolute or otherwise, from suit under Section 1985. Recognizing, as did this Court in ***Rouch***, that constitutional rulings should not be lightly made, the court in ***Stern*** stated:

> If it were clear that Congress contemplated and chose application of § 1985(1) that would create the consequences Stern seeks, *we would be obliged to balance these considerations* against the indisputable governmental power to protect federal officers against harassment and injury on account of the performance of their duties....

547 F3d at 1344 (emph. added).

Stern specifically declined to engage in that balancing analysis, instead ruling as a matter of statutory construction that Section 1985 was not applicable to complaints about government officials made to their supervisors. Notably, the court *did not* dismiss the plaintiff's state law defamation or even discuss whether the claim might be subject to immunity under the Petition Clause. Finding no actionable claim under Section 1985, it remanded the entire action to the district court for dismissal on the ground of lack of federal jurisdiction.

In ***Stevens v Tillman***, 855 F2d 394 (CA 7, 1988), one of the plaintiff's claims was for defamation. The jury was instructed that it could find for the plaintiff only upon a showing of actual malice, and returned a verdict in the amount of $1.00 for the plaintiff on the defamation claim. As the Seventh Circuit noted, the instruction was based on two grounds: the *plaintiff was a public official*, and the defendants were exercising their right to petition.

The Seventh Circuit affirmed that the plaintiff, a school principal, was a public official. It then went on to state that the defendants' statements were protected petitioning because directed to the school board, and were subject to the ***New York Times*** malice standard under ***McDonald***. The opinion does not, however, address whether ***McDonald*** would apply had the plaintiff *not* been a public figure. Such a determination was not necessary to its ruling, and the opinion's language regarding the Petition Clause issue cannot be related to such a determination.

The cases which Defendants string-cite are also inapposite. In ***Bradley v Computer Sciences Corp***, 643 F2d 1029 (CA 4, 1981), the plaintiff was a public official, and conceded that the defendants enjoyed a qualified privilege. The plaintiff in ***Miner v Novotny***, 304 MD 164; 498 A2d 269 (1985), was also a public official, since he was a police officer and the alleged defamation

involved the performance of his duties.[9] ***Gunderson v University of Alaska***, 902 P2d 323 (Alaska, 1995), involved no claim for defamation, or even an allegation of a false statement about the plaintiff. In ***Smith v Silvey***, 149 Cal App 3d 400; 197 Cal Rptr 15 (1983), the court overturned an injunction against the defendant under an anti-harassment statute on the ground that it prohibited him from *any* petitioning of government. There was neither a claim nor a discussion of defamation.

Defendants' claim that state and federal courts have held that defamation of a purely private figure enjoys qualified immunity under the Petition Clause has no support in the cases on which they rely. Broad statements, in *dicta*, cannot and should not form the basis for abridging this State's legitimate interest in protecting its citizens against damage from false and defamatory statements.

In ***Rouch***, this Court declined to rely solely on "rhetorical pronouncements and the speculation about 'self censorship' and 'breathing room'" in determining the reach of First Amendment protection, instead looking "more to empirical evidence in search of a justification for sacrificing the tort-law protection for one defamed." 427 Mich at 203. Defendants have provided no such empirical evidence at any stage of this action, nor do the cases on which they rely. Through its own reliance on this inapposite authority, the Court of Appeals panel below clearly erred in holding that Defendants' false and defamatory statements enjoyed qualified privilege from liability.

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[9] Moreover, in ***Miner*** the Maryland Court of Appeals reversed the trial court's finding that petitioning was absolutely privileged, in light of ***McDonald***. It did not purport to address whether all petitioning was subject to qualified privilege, stating that the ***New York Times*** standard described the furthest extent of constitutionally mandated protection.

3. THE ONLY STATE AND FEDERAL COURTS WHICH HAVE DIRECTLY ADDRESSED THE ISSUE HAVE HELD THAT THE ACTUAL MALICE STANDARD IS INAPPLICABLE TO A DEFAMATION ACTION BROUGHT BY A PURELY PRIVATE FIGURE.

The sole Michigan appellate case which has addressed the applicability of the ***New York Times*** actual malice standard to Petition Clause activity, other than in *dicta*, is ***Hodgins Kennels Inc v Durbin***, 170 Mich App 474; 429 NW2d 189 (1988).[10] In ***Hodgins***, the defendants had appealed from a jury verdict in the plaintiffs' favor on their claims for defamation and tortious interference with business relations. The defendants claimed error in the trail court's denial of their motions for directed verdict on the ground, *inter alia*, of qualified privilege under the Petition Clause, relying on ***McDonald***.

The ***Hodgins*** court rejected the defendants' reliance on ***McDonald***, distinguishing that case on the ground that the plaintiff there was unquestionably a public figure, and the state common law under which the case was brought required proof of actual malice. The court's ruling that a private figure need not demonstrate knowledge or reckless disregard of the falsity of defamatory statements constituted its *holding*, because it was necessary to the disposition of the defendants' appeal.

Defendants characterize ***Hodgins*** as an "erroneous" decision, arguing that "it is an incorrect statement of the law to say that the Petition Clause only protects statements regarding a 'public figure. ***Hodgins*** was wrong to the extent it stated otherwise.'" [*Appellees' Brief*, at 47]. ***Hodgins***, however, makes no such broad statement. To the contrary, the Court of Appeals panel in ***Hodgins*** acknowledged that a defamation action requires proof of "fault amounting to at least negligence on the part of the publisher." 170 Mich App at 485. This requirement is consistent with the holding in ***Gertz*** that states may impose liability for defamation without running afoul of First Amendment

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[10] *Rev'd in part on other grounds*, 432 Mich 894; 438 NW2d 247 (1989).

protections "so long as they do not impose liability without fault." 418 US at 347.

Defendants argue that ***Hodgins*** renders the Petition Clause a "redundancy," because it purportedly holds that only statements regarding a public figure are protected.[11] ***Hodgins*** neither states nor implies any such proposition. It holds that statements about purely private figures made to governmental entities enjoy the same constitutional protection as is conferred by the freedoms of speech and the press, which is in accord with ***McDonald***'s teaching that "First Amendment rights are inseparable...and there is no sound basis for granting greater constitutional protection" to one or another of those rights. 427 US at 485.

Defendants do not attempt to distinguish either ***Hodgins*** or ***In Re: IBP Confidential Business Documents Litigation***, 797 F2d 632 (CA 8, 1986) (*en banc*),[12] nor could they. In ***IBP***, the plaintiff brought an action for, *inter alia*, libel, based on a letter from his former employer, IBP, to several members of Congress accusing the plaintiff of theft and perjury. IBP appealed from a jury verdict for the plaintiff on the ground, *inter alia*, that its statements were absolutely privileged under the Petition Clause.[13]

The Eighth Circuit first noted that ***McDonald***, which had been decided after the district court proceedings, had rejected the notion of absolute privilege for petitioning. The court then engaged

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[11] According to Defendants, the Petition Clause would be "redundant" if false and defamatory statements about private figures, when made to government, received no greater protection than that afforded to the same statements when made in the press. Yet ***McDonald*** directly held that the Petition Clause provided no more protection for defamation than the ***New York Times*** qualified immunity required by freedom of the press. That the enumerated First Amendment freedoms provide equal levels of protection in different contexts does not render one or another "redundant."

[12] 800 F2d 787 (rehearing denied, *en banc*), *cert den* 479 US 1088; 107 S Ct 1293; 94 LEd2d 150 (1986).

[13] The district court had found that IBP's letter did not constitute petitioning activity at all, and therefore was not entitled to *any* constitutional protection. The Eight Circuit reversed this finding.

in a reasoned examination of the interplay among ***McDonald***, ***New York Times*** and ***Gertz*** in order to determine the degree of protection afforded. The court concluded:

> Since its decision in New York Times, the Supreme Court has sought an appropriate balance between two important yet often conflicting interests: (1) the interest in assuring vigorous and robust debate on public issues; and (2) the interest in protecting the reputation of each individual from unjustified defamatory attacks. As the principles intended to protect these interests have been shaped and defined, the Supreme Court has made clear that to identify the appropriate level of protection applicable in a particular case, a court must focus its inquiry on the question of whether the person defamed is a public official, a public figure, or a private figure.

797 F2d at 642-643.

The Eighth Circuit determined that the plaintiff was a private figure, and therefore that the ***New York Times*** actual malice standard was inapplicable. The court accordingly held that, under ***Gertz*** and ***McDonald***, the Petition Clause required only that the plaintiff demonstrate falsity of the defamatory statements and fault on the part of the defendants. ***IBP***, 797 F2d at 644.[14] ***IBP*** is directly on point.

In attempting to distinguish ***Dobkin v Johns Hopkins University***, 172 F3d 43 (CA 4, 1999) (1999 US App LEXIS 725), *cert den* 528 US 875; 120 S Ct 181; 145 LEd2d 153 (1999), Defendants flatly misrepresent the holding of the Fourth Circuit's opinion. In a counterclaim and third party

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[14] Defendants' statement that ***IBP*** "has been described as an 'aberration'" because of its reasoning, citing Aaron Gary, *First Amendment Petition Clause Immunity from Tort Suite: In Search of a Consistent Doctrinal Framework*, 33 Idaho L. Rev. 76 (1996), is somewhat misleading. Mr. Gary, like Defendants, cited several cases which contained dicta implying that all petitioning was subject to qualified immunity, and which did not employ a public/private figure analysis. *In comparison to those cases*, Mr. Gary stated: "The Eighth Circuit's analysis seems to be something of an aberration in the case law. Yet, a few commentators have also assumed or argued that *McDonald* employs the public/private figure method of analysis set forth in *New York Times*." It is noteworthy that Mr. Gary, whose sole stated credential is that he is an attorney practicing in Boise, Idaho, also maintains in his article that the ***McDonald*** decision is "seriously flawed" in failing to recognize *absolute* privilege for petitioning. 33 Idaho L. Rev. at 103.

complaint, two of the defendants brought defamation claims against the plaintiff, Dobkin, and his parents, based on letters written to, *inter alia*, Vice President Al Gore and Senator Robert Dole. The district court denied the Dobkins' motions for summary disposition, and the jury returned verdicts against the Dobkins.

The Fourth Circuit stated that *some* of the letters were not written to government officials and did not constitute petitioning, but did not (and *could not*) rest its entire holding on this ground. The court affirmed the jury verdict against the Dobkins based on *all* of the letters they had written, including those to a Senator and the Vice President. The court therefore *held* that: "[t]he Dobkins are not afforded the greater protection of the actual malice standard simply because they argue the petition clause. Rather, in accordance with other defamatory First Amendment cases, only if Dr. German and Ms. Fishbein qualify as public figures must they prove actual malice." ***Dobkin***, 1999 US App Lexis, at 17.

In failing to follow ***Hodgins***, ***IBP*** and ***Dobkin***, the panel below departed from the only cases which have directly addressed, in their holdings, the scope of protection which the Petition Clause provides to false and defamatory statements made about private figure plaintiffs. Neither the panel nor Defendants have distinguished those cases or demonstrated any fault in the reasoning of the opinions.

J & J Construction lost the benefit of its contract with the City of Wayne because of Defendants' false and defamatory statements regarding the quality of its work and its ability to complete work in a timely manner. Justice Brickley's opinion in ***Rouch*** expressly recognized the important interest of this State in providing a remedy for *proven falsity* which harms reputational interests.

The Court of Appeals opinion below abrogated that important interest without even

attempting the balancing evaluation which this Court recognized as necessary in ***Rouch***. Instead, it relied on broad *dicta* from inapposite cases and ignored well reasoned, persuasive authority holding that the First Amendment permits the States to impose liability for defamation of a private figure upon a showing of fault amounting to at least negligence. In so doing, the Court of Appeals panel committed clear error.

B. THE PETITION CLAUSE DOES NOT BAR J & J CONSTRUCTION'S ACTION FOR INTENTIONAL INTERFERENCE WITH BUSINESS EXPECTANCY.

Both Defendants and the ACLU rely heavily on the ***Noerr-Pennington*** doctrine in arguing that *all* non-defamation causes of action are barred if the conduct giving rise to the claim occurred in the course of a statement to a governmental agency. In so doing, both ignore two crucial aspects of J & J Construction's claim for intentional interference with its legitimate expectation of receiving the contract from the City of Wayne for which it was the lowest responsible bidder.

First, J & J's claim is based on Defendants' false and defamatory statements to the Wayne City Council, which the trial court specifically found to be the cause of J & J's loss of the contract. [***Appendix***, p. 84a, 87a].[15] As discussed above, negligently made defamatory statements are not

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[15] Defendants devote substantial space in their brief to the argument that J & J's intentional interference claim must be barred because it would require an improper or futile inquiry into whether King's defamatory statements *caused* the Wayne City Council to reject J & J's bid and deny J & J the contract. This argument ignores the fact that the trial court has already made that specific finding in this case. Not only have Defendants not challenged any of the trial court's findings at any stage of this appeal, they have directly acknowledged that its findings are "undisputed." [***Brief of Appellees***, at 8].

Tellingly, Defendants do not attempt to argue that the loss of the Wayne contract is not properly a measure of damages for J & J's defamation claim. Defendants acknowledge that defamation liability is proper upon proof of "actual malice," even where the defamatory statements are made in the course of otherwise legitimate petitioning activity. Economic damages are recoverable in a defamation action by a private figure. ***MCL 600.2911(7)***. The question of causation of economic damages presents no greater difficulty in the context of a defamation action than in an action for interference with contract or business expectancy.

protected under the First Amendment. An intentional interference claim based on actionable defamation could not abridge any rights granted by the Petition Clause and, therefore, the constitutional underpinnings of ***Noerr-Pennington*** are not applicable.

Second, King's defamatory statements were not an attempt to influence the Wayne City Council regarding the passage or enforcement of laws or any other aspect of policymaking, but merely to affect a purchasing decision which was completely non-governmental in nature. The political rights which the Petition Clause was designed to protect are not implicated where the "petitioning" activity is not directed at influencing policy decisions or other "governmental" decision making. Again, ***Noerr-Pennington*** cases are inapposite.

1. THE *NOERR-PENNINGTON* DOCTRINE DOES NOT BAR J & J CONSTRUCTION'S INTENTIONAL INTERFERENCE CLAIM BECAUSE ACTIONABLE DEFAMATION IS NOT PROTECTED PETITIONING ACTIVITY UNDER THE FIRST AMENDMENT.

The panel below, relying on sweeping dicta in ***Azzar v Primebank FSB***, 198 Mich App 512; 499 NW2d 973 (1993), *app den* 443 Mich 858; 505 NW2d 581, ruled that the ***Noerr-Pennington*** doctrine bars all claims arising out of petitioning activity, regardless of the underlying cause of action. This ruling flies in the face of the holding in ***McDonald*** that defamation claims do not improperly impinge on First Amendment petitioning rights, and misunderstands the constitutional underpinnings of ***Noerr-Pennington***.

In ***Noerr***,[16] the Supreme Court held as a matter of statutory construction that the Sherman Act was not intended by Congress to forbid anti-competitive conduct which results from government

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The issue of causation is, quite simply, neither presented in this appeal nor pertinent to this Court's decision.

[16] ***Eastern RR Presidents Conference v Noerr Motor Freight***, 363 US 127; 81 S Ct 523; 5 LEd2d 464 (1961).

action. If a government is free to enact anti-competitive legislation, the Court reasoned, then holding individuals liable for advocating such action "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity," ***Noerr***, 365 US at 137, a purpose not indicated by the legislative history.

In addition, the Court reasoned that a contrary construction would raise constitutional issues, and that it could not "lightly impute to Congress an intent to invade" the First Amendment freedom to petition government. 365 US at 137. This second rationale has provided the constitutional underpinning for the line of cases which have applied ***Noerr-Pennington*** to statutory and common law actions outside the realm of antitrust.

Where the *conduct* on which a common law cause of action is based is not protected under the First Amendment, however, the imposition of liability for that conduct does not raise any constitutional issues. Insofar as attempts to influence a governmental decision through false and defamatory statements do not fall within the protection of the Petition Clause, no constitutional right of a defendant is either abridged or even implicated by an action for damages caused by the defamation, regardless of the nature of the cause of action.

This principle was recognized by the Sixth Circuit in ***Windsor v The Tennessean***, 719 F2d 155 (CA 6, 1984), *cert den* 469 US 826; 105 S Ct 105; 83 LEd2d 50 (1984). In ***Windsor***, the plaintiff alleged that the defendants conspired to have him discharged as an assistant U.S. Attorney through, *inter alia*, defamatory statements about him. Although affirming the district court's dismissal of the plaintiff's claim under ***42 USC 1985***, the Sixth Circuit rejected the lower court's conclusion that the claim was barred by the Petition Clause.

Relying on ***White v Nichols, supra***, the court stated its disagreement with "the notion that a private person who conspires deliberately to defame a federal official in order to discredit that

official in the eyes of his superiors is protected by the first amendment right to petition for redress of grievances." ***Windsor***, 719 F2d at 162. "We therefore hold that the first amendment right to petition for redress of grievances does not protect from section 1985(1) liability those who conspire intentionally to defame a federal officer in order to effect that official's discharge." ***Id.***[17]

In arguing that the Petition Clause provides absolute immunity from J & J Construction's intentional interference claim, Defendants and the ACLU cite the following language from ***Video Intl Productions Inc v Warner-Amex Cable Communications Inc***, 858 F2d 1075, 1092 (CA 5, 1988), quoted in ***Arim v General Motors Corp***, 206 Mich App 178, 191; 520 NW2d 695 (1994): "There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition that can a statutory claim such as antitrust."

The natural corollary of that principle is that, if a common law action for defamation does not impermissibly abridge or chill the right of petition, there simply is no reason that another common law action based on the same conduct could do so. Because defamation is not protected under the Petition Clause, the constitutional underpinning of the ***Noerr-Pennington*** doctrine is not implicated by J & J Construction's action for interference with business expectancy.

The cases cited by Defendants do not support, much less compel, the Court of Appeals' conclusion that J & J's claim is barred. Both state and federal courts have indeed applied the reasoning behind ***Noerr-Pennington*** to actions other than antitrust, but in none of the cases was there either allegation or proof that the defendants' conduct was not *protected* petitioning activity.

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[17] As in ***McDonald***, the plaintiff in ***Windsor*** was admittedly a public official, required to establish actual malice in order to establish his defamation claim. The Sixth Circuit upheld the dismissal of his conspiracy claim against the private defendants on the ground the Tennessee Court of Appeals had previously held the statements not actionable under the ***New York Times*** standard. Dismissal of the claim against the U.S. Attorney was upheld on the ground of governmental immunity.

In ***Azzar, supra***, for instance, the Court of Appeals affirmed the trial court's ruling that the defendant was immune from liability for breach of fiduciary duty. The plaintiffs' claim was based on the defendant bank's successful attempt to influence the Federal Home Loan Bank Board to deny plaintiffs' request for approval of the purchase of additional stock in the bank. There was no claim for defamation presented, nor even any claim that the statements made by the defendant were not true. There was no issue in ***Azzar*** regarding whether the *conduct* of defendants constituted *protected* petitioning activity.

Similarly, in each of the federal cases cited by Defendants, there was no claim that any of the conduct in which the defendants engaged in the attempt to influence governmental action fell outside the protection of the First Amendment. *See, e.g.*, ***Bayou Fleet Inc v Alexander***, 234 F3d 852 (CA 5, 2000), *cert den* 532 US 905; 121 S Ct 1228; 149 LEd2d 138 (2001) (straightforward arguments in opposition to zoning changes and building permits, with no claim of defamation); ***Davric Maine Corp v Rancourt***, 216 F3d 143 (CA 1, 2000) (Sherman Act claim rejected for defendants urging of racing commission to deny race dates to plaintiff, lobbying of legislature for statute permitting construction of competing race track, and filing lawsuits for eviction and assault, with no claim of defamation or false statements[18]); ***Manistee Town Center v City of Glendale***, 227 F3d 1090 (CA 9, 2000) (opposition to zoning change and government lease of building, with no allegation of defamation or false statement; state law tortious interference claim *not* dismissed, but remanded to state court after dismissal of federal law claim); ***TEC Cogeneration Inc v Florida Power & Light Co***, 76 F3d 1560 (CA 11, 1996) (pure policy-based lobbying of county board of commissioners in opposition to construction of power line, with no allegation of defamation or other non-protected

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[18] The claim for tortious interference with advantageous relationships in ***Davric*** was dismissed for lack of evidence, and not on ***Noerr-Pennington*** or Petition Clause grounds. 216 F3d at 150.

conduct).

See also, ***Sessions Tank Liners Inc v Joor Mfg Inc***, 17 F3d 295 (CA 9, 1994) (lobbying for adoption of fire code, with no claim of improper methods); ***Boone v Redevelopment Agency***, 841 F2d 886 (CA 9, 1988) (alleged "false reports and misrepresentations" to officials related to availability of parking in development district, not defamation of the plaintiff); ***Oberndorf v City and County of Denver***, 900 F2d 1434 (CA 10, 1990) (lobbying for city counsel finding that area was blighted, with no allegation of defamation or false statements[19]); ***Suburban Restoration Co v Amcat Corp and Laborers' Local 665***, 700 F2d 98 (CA 2, 1992) (claims based on institution and settlement of law suit, with no allegation of defamation[20]); ***Brownsville Golden Age Nursing Home Inc v Wells***, 839 F2d 155 (CA 3, 1988) (action for interference with business relationships based solely on complaints to state licensing board, with no allegation of false statements or defamation); ***Herr v Pequea Township***, 274 F3d 109 (CA 3, 2001) (claim under § 1983 based on participation in administrative procedures and litigation regarding zoning, with no allegation of defamation or other improper conduct).

The cases which Defendants cite stand for the proposition that neither statutory nor common law causes of action can be permitted where they arise from activity which is *protected* by the

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[19] Contrary to the ACLU's argument that immunity applies "regardless of the *means* he or she may have used to persuade the government," the court in ***Oberndorf*** recognized that attempts to influence government through "bribery of misuse or corruption of governmental processes" enjoyed no protection under ***Noerr-Pennington***, but found that the plaintiff had not demonstrated such abuse. 900 F2d at 1441. **See also,** ***Instructional Systems Dev Corp v Aetna Cas & Sur Co***, 817 F2d 639, 650 (10th Cir. 1987).

[20] Defendants misrepresent the holding in ***Suburban Restoration***. The court stated that it was not bound to follow language in prior Second Circuit cases describing ***Noerr-Pennington*** as an application of the First Amendment because it was not necessary to the holdings of those cases. 700 F2d at 101. The court expressly declined to rule on the issue, basing its ruling on construction of the Connecticut Unfair Trade Practices Act. ***Id.***

Petition Clause. J & J Construction has never argued that this proposition is not both sound and well established; it is, however, irrelevant to this appeal. By employing false and defamatory statements about J & J in order to influence the Wayne City Council's decision, Defendants were not engaged in protected "petitioning" within the scope, intent or protection of the First Amendment.

Because Defendants' defamation does not enjoy protection under the Petition Clause, ***Noerr-Pennington*** and its progeny are inapposite. There is no constitutional basis for barring J & J Construction's action for intentional interference with business expectation accomplished through false, defamatory statements.

2. *NOERR-PENNINGTON* DOES NOT BAR J & J'S INTENTIONAL INTERFERENCE CLAIM BECAUSE DEFENDANTS WERE NOT SEEKING "GOVERNMENTAL" ACTION WITHIN THE MEANING OF THE PETITION CLAUSE.

Defendants, the ACLU and the Court of Appeals panel below have consistently mischaracterized J & J Construction's position as an argument for a "commercial" exception to the ***Noerr-Pennington*** doctrine. They proceed to knock down this strawman with numerous cases holding that there is only one exception to the doctrine – the "sham" exception.

It is indisputable that the First Amendment protects "petitioning" regarding not just purely political matters, but also protects a citizen's right to influence governmental policy regarding his or her economic interests. Defendants here, however, sought merely to influence a city's conduct as another purchaser of goods and services in the marketplace. The issue is whether such conduct constitutes "petitioning" within the contemplation and protection of the Petition Clause. If not, then no "exception" to ***Noerr-Pennington*** is necessary – ***Noerr-Pennington*** is simply inapposite.

"It is fundamental that the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" ***Legal Services v Velazquez,*** 531 US 533, 548; 121 S Ct 1043; 149 LEd2d 63 (2001), quoting from ***Roth***

v ***United States***, 354 US 476, 484; 77 S Ct 1304; 1 LEd2d 1498, (1957). In recognition of this principal, the Supreme Court in ***Noerr*** found that Congress could not have intended the Sherman Act to apply to attempts to obtain anti-competitive governmental decisions, "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 US at 138.

In ***George R Whitten Jr Inc v Paddock Pool Builders Inc***, 424 F2d 25 (CA 1, 1970), *cert den* 400 US 850; 91 S Ct 54; 27 LEd2d 88, the First Circuit held that, where an individual's approach to a government agency was not related to any attempt to influence the passage or enforcement of law, or to influence policy making, it fell outside the scope and protection of the Petition Clause and, therefore, outside the realm of ***Noerr-Pennington***. The defendant had attempted to influence governmental entities not to purchase swimming pools and materials from the plaintiff not for policy reasons, but based on false statements regarding the plaintiff's lack of experience. The court concluded: "In light of these considerations, we see no constitutional objection to requiring Paddock to observe the same limitations in dealing with the government as it would in dealing with private consumers."

Whitten does not purport to create a "commercial" exception to ***Noerr-Pennington*** for attempts to influence government policy regarding economic matters. Rather, the case recognizes that, where a governmental entity is acting purely as a consumer in the marketplace, there is no reasonable basis for distinguishing it from any private consumer. Attempts to influence its purchasing decisions through disparagement of a potential seller are completely unrelated to the "interchange of ideas for the bringing about of political and social changes," do not implicate First Amendment rights, and do not enjoy immunity from common law or statutory causes of action. The soundness of ***Whitten's*** reasoning has been accepted by every federal court which has directly

addressed the issue.[21]

The ACLU argues that ***Whitten*** and ***Hecht*** mistakenly apply the state action antitrust immunity doctrine developed by the Supreme Court in ***Parker v Brown***, 317 US 341; 63 S Ct 307; 87 LEd 315 (1943). To the contrary, ***Whitten*** specifically considered the defendants' claim of ***Parker*** immunity, engaged in a lengthy analysis of its reach and import, and rejected the argument. 424 F2d at 30-31. The Court specifically discussed the fact that the ***Parker*** and ***Noerr-Pennington*** doctrines, "while often treated as one" must be analyzed separately. 424 F2d at 29, n. 4. The First Circuit then examined the application of ***Noerr-Pennington*** to non-policy related, competitive bidding purchasing decisions, specifically in terms of First Amendment petitioning considerations.[22]

The ***Whitten*** line of cases is expressly based on the determination that the First Amendment right to petition is not implicated where an individual attempts to influence a distinct purchasing decision by a governmental agency, and the governmental decision is not related to law or policy making or implementation.[23]

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[21] ***See, Hecht v Pro-Football, Inc***, 444 F2d 931 (CA DC, 1971), *cert den* 404 US 1047; 92 S Ct 701; 30 LEd2d 736 (1972); ***Israel v Baxter Laboratories***, 466 F2d 272 (CA DC 1972); ***Ticor Title Ins Co v Federal Trade Comm***, 998 F2d 1129 (CA 3, 1993), *cert den* 510 US 1190; 114 S Ct 1292; 127 LEd2d 646 (1994); ***Buddie Contracting Inc v Searight***, 595 F Supp 422 (ND Ohio, 1984); ***Compact v Metro Gov of Nashville***, 594 F Supp 1567 (MD Tenn, 1984); ***General Aircraft Corp v Air America Inc***, 482 F Supp 3 (D DC, 1979). These cases are discussed more fully in J & J Construction's opening brief.

[22] The District of Columbia Circuit, in ***Hecht***, also engaged in thorough, scholarly and *separate* analyses of the ***Parker*** state action and ***Noerr-Pennington*** doctrines, particularly recognizing the First Amendment underpinnings of ***Noerr***. ***See***, 444 F2d at 940.

[23] The ACLU attempts to argue that the Wayne City Council's rejection of J & J Construction's *was* a policy decision, because determinations whether to build an aquatic center, how much money to spend on masonry rather than other features, and whether to engage union or non-union contractors are matters of policy. The decision to build the aquatic center was obviously made long before J & J's bid was submitted, must less rejected. The notion that the city decided to spend *more* on the masonry work rather than on "other features," by accepting a higher bid, aside from being completely without support in the record, is completely ludicrous. Finally, the unchallenged factual

Again, the cases on which Defendants rely are inapposite because they do not address the issue whether attempts to influence purely consumer oriented, rather than governmental, decisions fall within the purview of the Petition Clause or ***Noerr-Pennington***. Each case involved genuine "petitioning" activity intended to affect a legislative or policy decision by a governmental entity.

Thus in ***In Re Airport Car Rental Antitrust Litigation***, 693 F2d 84 (CA 9, 1982), one plaintiff claimed that the defendants were liable for violation of the Sherman Act through lobbying of officials of governmentally owned airports to institute a policy of leasing space only to rental car companies which satisfied a number of conditions, including "a nationwide credit-card and reservations system, additional car-return stations away from the airport, and a specified number of years experience at a specified number of airports." 693 F2d at 85. The court rejected the plaintiff's contention that, because the government was engaged in a proprietary function, *i.e.*, running an airport for profit, the defendants' lobbying efforts did not constitute protected petitioning,

The Ninth Circuit considered ***Whitten***, ***Hecht*** and ***Woods Exploration & Producing Co v Aluminum Co of America***, 438 F2d 1286 (CA 5, 1971), *cert den*, 404 US 1047; 92 S Ct 701; 30 LEd2d 736 (1972), in light of the plaintiff's argument for a "commercial" or "proprietary activity" exception to ***Noerr-Pennington***. The court properly rejected the notion that these cases recognized a "commercial" exception, as such, but misapprehended the reasoning of ***Whitten*** and ***Hecht***:

> All three courts properly couched their discussions of ***Noerr-Pennington*** in terms of the first amendment and the importance of free-flowing communication to government decision making. Their only possible flaw was presuming that decisions implementing rather than formulating policy (sometimes called "nonpolitical activity") do not implicate these two interests sufficiently to invoke ***Noerr-Pennington*** protection. They did not ignore the

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findings by the trial court conclusively establish that the city's decision was the direct result of Defendants' defamatory statements regarding the quality of J & J's work and its ability to complete the job on time, and not of any pro- or anti-union policy determination.

interests by creating a commercial exception.

693 F2d at 87-88.

Neither ***Whitten*** nor ***Hecht*** involved the *implementation* of a *policy* decision: the thrust of both cases was that the governmental decision at issue was unrelated to policy. Because ***Airport Car Rental*** clearly involved a governmental policy decision, however, its misinterpretation of ***Whitten*** and ***Hecht*** is not pertinent here.

Similarly, in ***Greenwood Utilities Comm v Mississippi Power Co***, 751 F2d 1484 (CA 5, 1985), the Fifth Circuit acknowledged that the governmental decision for which the defendants had lobbied Congress and a division of the Department of Agency involved a "determination of how much competition was desirable" in the electric power industry. 751 F2d at 1499. The court rejected a blanket "commercial" exception to ***Noerr-Pennington*** "where the government engages in a *policy decision* and at the same time acts as a participant in the marketplace." ***Id.*** at 1505 (emph. added). Because Defendants here did not attempt to influence, and the City of Wayne did not make, any "policy decision," ***Greenwood*** is distinguishable.

There can be no dispute that if Defendants had caused J & J Construction to lose a valuable contract with a private entity through King's false, defamatory disparagement, Defendants would properly be held liable. The State of Michigan has a strong, legitimate interest in enforcing common law protection of its citizens against such wrongful, intentional interference with business expectancy. The mere fact the J & J's potential client was a governmental agency should not, in and of itself, render Defendants immune from their wrongful conduct.

The ability of citizens to make their feelings known regarding the enactment and enforcement of laws and regulations, and regarding public policy decisions, is essential to the functioning of democracy and unquestionably within the protection of the First Amendment right to petition.

Where a governmental agency is making a decision between products, acting purely as a consumer in the marketplace, these important democratic interests are not implicated. Holding Defendants liable for their wrongful, defamatory conduct in affecting such a decision neither abridges nor chills the exercise of any constitution right.

C. THE ISSUE OF FEDERAL LABOR LAW PREEMPTION OF J & J CONSTRUCTION'S CLAIM FOR INTENTIONAL INTERFERENCE WITH BUSINESS EXPECTANCY IS NOT PROPERLY BEFORE THIS COURT.

Defendants devote substantial argument to the issue whether J & J Construction's claim for intentional interference is preempted by the National Labor Relations Act, ***29 USC 150, et seq.***, based on their position that King's defamatory statements to the Wayne City Council were made in the course of a labor dispute. This contention was rejected by the trial court and by the Court of Appeals.

MCR 7.303(F)(4)(a) provides: "Unless otherwise ordered by the Court, appeals shall be limited to the issues raised in the application for leave to appeal." J & J Construction's application for leave to appeal did not raise any issue regarding the Court of Appeals ruling on the federal labor law preemption issue. Defendants have filed no application for cross-appeal of the Court of Appeals ruling, as permitted under ***MCR 7.303(D)(2)***.

While the court rules permit this Court to grant a motion to add additional issues, "for good cause," ***MCR 7.303(F)(4)(b)***, Defendants have neither filed any such motion nor offered any good cause why, if brought, such a motion should be granted.

In ***Peisner v Detroit Free Press***, 421 Mich 125, 129, n 5; 364 NW2d 600 (1984), this Court stated:

> We disapprove of the [appellee's] attempt to have this Court review its arguments as to liability in the absence of a cross-appeal. Our appellate procedure is designed to focus the issues on appeal and provide the parties

> with an opportunity to fully brief and argue *those* issues. This purpose is frustrated by the injection of new issues in the answering brief. Appellees wishing to challenge rulings adverse to them should do so directly by way of a cross-appeal.

J & J has focused its briefs on the issues properly presented in this appeal and, in reliance on the court rules, does not respond to Defendants' federal preemption argument.[24]

III. CONCLUSION

Defendants' false and defamatory disparagement of J & J Construction, although directed to the Wayne City Council, does not enjoy qualified, much less absolute immunity. The First Amendment permits actions for defamation of private figures, committed in the course of petitioning to a government entity, upon a showing of fault amounting to negligence. The trial court properly found that J & J Construction had established the requisite fault of Defendants, and the Court of Appeals clearly erred in reversing the judgment in J & J's favor on its defamation claim.

Because J & J's claim for intentional interference with business expectancy was based on Defendants' unprotected, defamatory statements, and because the City's decision to reject J & J's bid was unrelated to any policymaking determination, neither the Petition Clause nor the *Noerr-Pennington* doctrine provide Defendants with immunity. The Court of Appeals clearly erred in reversing the judgment in J & J's favor on its intentional interference claim.

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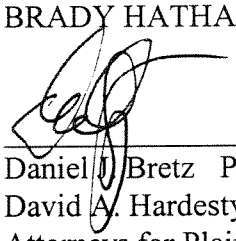
[24] Defendants' federal preemption argument was rejected by the trial court and the Court of Appeals based on the *factual* finding that no "labor dispute" existed between the parties at the time that King made the false and defamatory statements at issue. The case law establishing the requirement that such a "labor dispute" exist before NLRA preemption applies, and the evidence establishing the lack of such a dispute here, were set forth in the briefs submitted by J & J Construction in both courts below. J & J has not briefed either the pertinent law or the factual record before this Court precisely because the issue of federal labor law preemption is not presented in this appeal.

The Court of Appeals' decision must be reversed, and the judgment of the trial court reinstated.

Respectfully submitted,

BRADY HATHAWAY, P.C.



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